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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN THE MATTER OF:	)
	) **DOCKET NO. RCRA-05-2008-0007**
John A. Biewer Company of Ohio, Inc.	)
300 Oak Street	)
St. Clair, Michigan 48079-0497	)
	)
U.S. EPA ID #: OHD 081 281 412	)
	)
Respondent	)
	)

MOTION FOR PARTIAL ACCELERATED DECISION

Pursuant to 40 C.F.R. § 22.20, the Administrator's Delegated Complainant hereby moves that the Presiding Officer in this matter enter a finding that Respondent has waived any claim that it otherwise may have that it is unable to pay the penalty amount proposed for the violations it is alleged to have committed in the Complaint and Compliance Order, filed in this matter on May 5, 2008. A Memorandum in Support of a Partial Accelerated Decisions accompanies this Motion and sets forth reasons in support of the Motion.

Respectfully submitted,

Richard R. Wagner

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MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL ACCELERATED DECISION

Pursuant to 40 C.F.R. § 22.20, the Administrator's Delegated Complainant has moved that the Presiding Officer in this matter enter a finding that Respondent has waived any claim that it otherwise may have that it is unable to pay the penalty amount proposed for the violations it is alleged to have committed in the Complaint and Compliance Order, filed in this matter on May 5, 2008. Given the pleadings in this matter, entry of such a finding in an accelerated decision order is supported by the law.

This matter is brought under Section 3008(a) of the Resource Conservation and Recovery Act of 1976, as amended (RCRA), 42 U.S.C. § 6928(a), exclusively authorizing the Administrator to assess a civil penalty of up to $25,000 per day of noncompliance for each violation of a requirement of Subchapter III of RCRA (Sections 3001-3023, 43 U.S.C. §§ 6921-6939(e)). In determining the amount of penalty to assess for specific violations, the Administrator is to "take into account" the following:

(1) the seriousness of the violation, and

(2) any good faith efforts to comply with applicable requirements.

Section 3008(a)(3) of RCRA, 42 U.S.C. § 6928(a)(3).

In reversing an initial decision of an Administrative Law Judge (ALJ), the Environmental Appeals Board (the Board) addressed the issue of "ability to pay" in the Administrator's RCRA civil penalty assessment process. In Re Carroll Oil Company, 10 E.A.D. 635 (July 31, 2002). The Board ruled on enforcement staff's appeal from the initial decision. Enforcement staff argued that:

> the ALJ erred by finding in favor of Carroll Oil's claims that it was unable to pay a penalty and return the facility to compliance [footnote omitted] because 'Carroll Oil failed to sustain its burden of proof and provide substantial evidence in the record to support any such finding.'

Id. 661. The Board noted that "ability to pay" is not a statutory penalty criteria identified in RCRA, and "considering 'ability to pay' is not part of [enforcement staff's] prima facie burden in determining a penalty amount." Id. 662. The Board ruled that, in order to be considered in a RCRA penalty assessment proceeding, the "ability to pay" issue "must be raised and proven as an affirmative defense by the respondent." Id. 663.

In promulgated rules which govern this proceeding, the Administrator has provided that, in answering a complaint, a respondent must state:

1. The circumstances or arguments that respondent alleges constitute the grounds of defense;

2. The facts that respondent disputes;
3. The basis on which respondent disputes the proposed relief, that being the amount of penalty, proposed; and

4. Whether respondent requests a hearing.

40 C.F.R. § 22.15(b). Moreover, the Administrator further provides that, if requested, a hearing may be conducted "upon the issues raised by the complaint and answer." 40 C.F.R. § 22.15(c).

In Section 556(c) of the Administrative Procedure Act (the APA), Congress provides that an Administrative Law Judge (ALJ) may be appointed to conduct any hearing that is necessary, and, in conducting any such hearing, the actions of the ALJ are "[s]ubject to the published rules of the agency and within its powers[.]"[1] This has been interpreted to mean that, on matters of law and policy, an ALJ is subordinate to the agency in which he serves.[2] The U.S. Supreme Court has

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[1]"Agency" is defined under the APA as "each authority of the Government of the United States[.]" Section 551(1) of the APA, 5 U.S.C. § 551(1). Legislative history reveals that "'[a]uthority' means any officer or board, whether within another agency or not, which by law has authority to take final and binding action with or without appeal to some superior administrative authority." Tom C. Clark, Attorney General, U.S. Department of Justice, Attorney General's Manual on the Administrative Procedure Act, 9 (1947). The Attorney General's Manual is "the Government's own most authoritative interpretation of the APA" and one which the U.S. Supreme Court "[has] repeatedly given great weight[,]" [citations omitted], as it "was prepared by the same Office of the Assistant Solicitor General that had advised Congress in the latter stages of enacting the APA, and was originally issued 'as a guide to the agencies in adjusting their procedures to the requirements of the Act.' AG's Manual 6." Bowen v. Georgetown Univ. Hospitals, et al., 488 U.S. 204, at 218, J. Scalia concurring (1988). See also Pacific Gas & Elec. Co. v. Fed. Power Comm'n, 506 F.2d 33, 38 n. 17 (D.C. Cir. 1974) ("THE ATTORNEY GENERAL'S MANUAL is entitled to considerable weight because of the very active role that the Attorney General played in the formulation and enactment of the APA."). As it is "the Administrator" that exclusively is authorized by Congress to assess civil penalties for violations of the federal environmental statutes, including the CAA, "the Administrator" is the "authority of the Government of the United States," and, therefore, "the agency" as identified in the APA. In other statutes a "Board" or "Commission" or "Secretary" might be the "agency."

[2]Addressing Section 556(c) of the APA, and citing legislative history, the Attorney General of the United States has stated that "[t]he phrase 'subject to the published rules of the agency' is intended to make clear the authority of the agency to lay down policies and procedural rules which will govern the exercise of such powers by presiding officers." Attorney General's Manual, at 75 (1947). In addition, the Federal Courts consistently have recognized that, on matters of law and policy, the ALJs are subordinate to the agency in which they serve. See Croplife Am. v. EPA, 329 F.3d 876, 882 (D.C. Cir. 2003) ("[T]he reality of agency operations makes it clear that ALJs *cannot* independently rule on the legality of third-party human studies, because they may not ignore the Administrator's unequivocal statement prohibiting the agency

recognized that Congress intended to make ALJs "semi-independent subordinate hearing officers," and that an ALJ "is a creature of Congressional enactment." Ramspeck v. Federal Trial Examiners Conference, 345 U.S. 128, at 132-133 (1952).[3]

Consequently, to preserve it as an issue for hearing, a respondent is required by the Administrator's Rules and published decisions to raise in its Answer any issue as to its ability to pay the penalty amount proposed in its Answer. If a respondent declines or fails to do so, under the rules and published decisions that govern this proceeding, and the APA, the Administrator's

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from considering such studies." (emphasis in original)); Iran Air v. Kugleman, 996 F.2d 1253, at 1260 (D.C. Cir. 1993)("[i]t is commonly recognized that ALJs 'are entirely subject to the agency on matters of law'"); Mullen v. Bowen, 800 F.2d 535, at 540 n.5 (6th Cir. 1986) ("Administrative law judges therefore remain entirely subject to the agency on matters of law and policy"). See also: D'Amico v. Schweiker, 698 F.2d 903, 904-906 (7th Cir. 1983) (stating that ALJs must comply with "instruction" issued by the Chief Administrative Law Judge of the agency, announcing "new policy," even though the instruction "truncated" ALJs' discretion, and ALJs believed the instruction injured social security claimants); and Ass'n of Administrative Law Judges v. Heckler, 594 F.Supp. 1132, 1141 (D.C. Dist. 1984) (an ALJ "must 'scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts,'" but "[o]n matters of law and policy, however, ALJs are entirely subject to the agency."). Judge Ruth Bader Ginsburg, writing for the Circuit Court of Appeals for the District of Columbia, has noted that, while an ALJ must "conduct the cases over which he presides with complete objectivity and independence[,]" at the same time "he is governed, as in the case of any trial court, by the applicable and controlling precedents[,]" and these precedents include ". . . agency regulations [and] the agency's policies as laid down in its *published* decisions. . . ." Iran Air, at 1260, quoting Joseph Zwerdling, Reflections on the Role of an Administrative Law Judge, 25 Admin.L.R. 9, 12-13 (1973) (emphasis in original).

[3]In 1978 amendments to the APA, Congress provided that hearing examiners shall be known as administrative law judges. 95 P.L. 251; 92 Stat. 183 (March 27, 1978). Consequently, the terms "hearing officer" and "trial examiner" and "ALJ" all refer to the same governmental officer. Notwithstanding the name change, no amendment was made to Sections 556 and 557 of the APA, 5 U.S.C. §§ 556 and 557, effecting the authority of this particular governmental officer. For a review of the historical development of this officer, see K. Davis, Administrative Law Treatise, 2nd Ed., § 17.11 (1980).

Delegated Complainant is entitled to a ruling that the respondent has waived any claim that its is unable to pay the penalty amount proposed.

In an effort to apprise Respondent in this matter of its obligation to raise in its Answer any affirmative defense that it may have, Complainant provided explicit notice to Respondent. In bold type, Respondent was informed of the following:

> **A respondent's Answer must clearly and directly admit, deny or explain each of the factual allegations contained in the Complaint with respect to which respondent has any knowledge, or, where respondent has no knowledge of a particular factual allegation, so state. 40 C.F.R. § 22.15(b). A respondent's Answer must also state:**
>
> **1. The circumstances or arguments that respondent alleges constitute the grounds of defense;**
>
> **2. The facts that respondent disputes;**
>
> **3. The basis on which respondent disputes the proposed relief, that being the amount of penalty proposed; and**
>
> **4. Whether respondent requests a hearing.**
>
> **40 C.F.R. § 22.15(b).**
>
> **A respondent's failure to admit, deny or explain any material factual allegation in the Compliant will constitute an admission of the allegation. 40 C.F.R. § 22.15(d). Respondent should further note that the Administrator's Rules provide that any hearing that shall be held will be a "hearing upon the issues raised by the complaint and answer." 40 C.F.R. § 22.15(c).**

Complaint, at 8-9.

Notwithstanding that Respondent directly was placed on notice in the Complaint that it was required to "state . . .[t]he basis on which respondent disputes the proposed relief, that being the amount of penalty proposed[,]" in its Answer, the only response it makes to the penalty amount proposal is the following:

> Respondent neither admits not denies the legal allegations contained in the "Proposed Civil Penalty" portion of the complaint, and further responds that the asserted penalty of $282,649 is excessive.

Answer to Complaint and Compliance Order, at 7. Respondent makes no other statment in response to the penalty amount proposed.

As Respondent has the burden to raise in its Answer any "ability to pay" claim that it may wish to raise, see 40 C.F.R. § 22.15(b) and Carroll Oil Company, 10 E.A.D. at 663, and it has failed or declined to so, as a matter of law, 40 C.F.R. 22.20, Complainant is entitled to a finding that Respondent does have an ability to pay the penalty amount proposed.[4]

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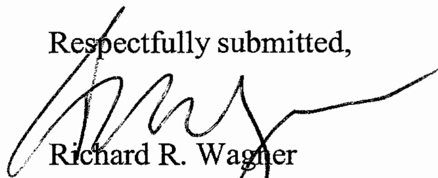
[4]There is more involved here than simply making a point of law. When any respondent raises its "ability to pay" a proposed penalty amount as an issue, for the Administrator to have any reasonable expectation of having a final decision which addresses the issue with any integrity, his enforcement staff, as well as the ALJ and Board, must have before them relevant, probative and complete financial data of the respondent. Moreover, governing law in this proceeding is that "the Agency may look at the financial condition of a related company to determine whether the related company may be a legitimate source of funds affecting the respondent's ability to pay or the economic impact of the penalty." Carroll Oil Company, 10 E.A.D. at 665. Consequently, for the Administrator's process to address the issue requires that a respondent submit to it copies of income tax returns for the several most recent years, annual reports, audited financial statements, declarations of assets and other financial data, both of itself and, if appropriate, of any related company. When submitted to enforcement staff, this financial data must be reviewed by a certified financial analyst, who will then become an expert witness for purposes of informing those who participate in the process of the financial status of the respondent and its ability to pay the penalty amount proposed. Toward this end, the initial submission of financial data by respondent may not be adequate, but, rather, raise issues that only can be resolved by respondent's submission of additional documentation. Once enforcement staff's financial analyst has rendered an opinion on the issue, and it is made available to respondent, respondent may wish to retain its own expert, if it has not already done so, who may have a different opinion on the issue. These are steps the parties must take to become adequately prepared to professionally and competently conduct a hearing on a respondent's financial circumstances. Time is needed to take these steps. When respondents are informed in administrative complaints that the Administrator, by rule, requires that they raise such issues in their answers, and are held accountable for complying with that rule, enforcement staff will have notice with the filing of an answer that "ability to pay" will be at issue. It can then immediately make a written demand of respondent for the financial data necessary to address such an issue, and, on receipt of that data, submit it to a financial analyst retained by the Administrator. In this

Consequently, the Administrator's Delegated Complainant respectfully requests that an Order of Partial Accelerated Decision be entered, finding that Respondent has failed or declined to raise any issue as to its ability to pay the penalty amount proposed in this matter, and ruling that, under the law governing these proceedings, the issue is not material at any hearing to be conducted.

Respectfully submitted,



Richard R. Wagner
Senior Attorney and Counsel for
the Administrator's Delegated Complainant

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case, had respondent raised the issue in its initial Answer to Complaint and Compliance Order, as required by governing law, this process could have commenced on service of the Answer on the Administrator's Delegated Complainant. In contrast, if the controlling law is not applied, the Respondent continues to have the opportunity to raise the issue at any time, even days before the hearing, in which case the Administrator's process is confronted with either delaying the hearing to allow sufficient time for the submission of necessary financial records, and their review by a financial analyst, or causing a timely hearing to go forward on the flimsiest of evidence, with a haphazard and incomplete review of the respondent's financial status resulting. Under the later circumstances, the determination of the issue will rest on an inadequate record and adversely affect the integrity of any final decision of the Administrator. Adherence to the rules and published decisions of the Administrator governing the issue of a respondent's "ability to pay" is vital to assure that a sound, fair and timely, decision will be made as to an appropriate penalty amount for the violations Respondent is alleged to have committed in the Complaint.

In Re John A. Biewer Company of Ohio, Inc.
No. RCRA-05-2008-0007

CERTIFICATE OF SERVICE

I hereby certify that today I filed the original of the **Motion for Partial Accelerated Decision,** and **Memorandum in Support of Motion for Partial Acelerated Decision,** in the office of the Regional Hearing Clerk (E-13J), United States Environmental Protection Agency, Region 5, 77 W. Jackson Boulevard, Chicago, IL 60604-3590, with this Certificate of Service.

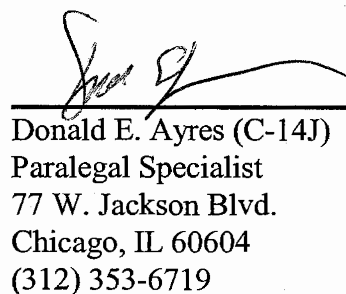
I further certify that I then caused true and correct copies of the filed documents to be mailed to the following:

Honorable William B. Moran
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Ariel Rios Building, Mailcode: 1900L
1200 Pennsylvania Ave., NW
Washington, D.C. 20460

I further certify that I then caused true and correct copies of the filed documents to be sent to the following, by mail:

Douglas A. Donnell
Mika Meyers Beckett & Jones, PLC
900 Monroe Avenue, NW
Grand Rapids, MI 49503-1423

June 26, 2008



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